5-18-2016

Steinemer v. State Respondent's Brief Dckt. 43231

IN THE SUPREME COURT OF THE STATE OF IDAHO

DOUGLAS JAMES STEINEMER,	)	
	)	**No. 43231**
Petitioner-Appellant,	)	
	)	**Ada Co. Case No.**
vs.	)	**CV-2014-14373**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE TIMOTHY L. HANSEN, District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Douglas Steinemer appeals from the district court's summary dismissal of his post-conviction petition.

Statement Of Facts And Course Of Proceedings

The following facts and proceedings of Steinemer's underlying criminal case are derived from the Idaho Court of Appeals' unpublished decision in State v. Steinemer, Docket No. 39869, 2013 Unpublished Opinion No. 472 at 1-2 (Idaho App. April 30, 2013):

> On June 28, 2003, Steinemer kidnapped a woman in Mountain Home at knifepoint, bound her hands, covered her eyes and mouth with tape, and transferred her to the cab of a semi-truck. Steinemer and another individual, later identified as Hans Michael Holsopple, Steinemer's biological father, proceeded to drive from Mountain Home toward the Oregon-Idaho border, stopping multiple times to rape the victim who was being held in the sleeper area of the truck's cabin. The two men eventually released the victim, and she was able to contact a friend who took her to the hospital. DNA samples were collected as part of a sexual assault examination, and the DNA profiles of two unknown individuals were entered into a national DNA database. In 2009, police were notified that Steinemer's DNA profile, which apparently had been recently added to the national database as part of an unrelated Florida case, appeared to match the profile of one of the victim's previously unidentified attackers. Steinemer was arrested in February 2010. After being advised of his *Miranda* rights, Steinemer admitted to kidnapping and raping the victim. [Footnote omitted.]
>
> Steinemer was indicted on one count of kidnapping in the first degree and three counts of rape. Pursuant to a plea agreement, Steinemer pleaded guilty to kidnapping in the first degree and to one count of rape, and the remaining rape charges were dismissed. Approximately six weeks later, Steinemer filed a motion to withdraw his guilty plea. He asserted that, prior to pleading guilty, he had not seen or heard the recording of a police interview with the victim in which the victim made statements that,

> according to Steinemer, supported a defense to the crimes, and that he would not have pleaded guilty if he had seen the recorded interview. After a hearing,[1] the district court denied Steinemer's motion to withdraw his guilty plea. The district court imposed concurrent unified sentences of thirty years with thirteen-year determinate terms.

The Idaho Court of Appeals affirmed the district court's order denying Steinemer's motion to withdraw his guilty plea. Id. at 5.

On July 11, 2014, Steinemer filed a post-conviction petition with a supporting affidavit, and, at his request, he was appointed counsel. (R., pp. 4-16, 84.) The state filed a motion for summary dismissal and an Answer and Brief in Support of Motion for Summary Dismissal with attached exhibits -- including a transcript of the hearing on Steinemer's motion to withdraw his guilty plea. (R., pp.20-22, 28-81.) Steinemer filed a memorandum in response to the state's answer and the state's motion for summary dismissal. (R., pp.107-113.) After a short hearing without any testimony (see generally 1/16/15 Tr.), the district court entered a Memorandum Decision and Order granting the state's motion for summary dismissal and a Judgment dismissing Steinemer's post-conviction petition with prejudice. (R., pp.117-123, 124-125.) Steinemer filed a timely Notice of Appeal. (R., pp.126-130.)

[1] At the hearing on his motion to withdraw his guilty plea, Steinemer was represented by a different attorney (Mr. Chastain) than his trial counsel, and the state presented testimony of an investigator from the prosecutor's office (Mr. Tuttle) and Steinemer's trial counsel (Mr. DeFranco). (R., pp.56-66.)

ISSUE

Steinemer states the issue on appeal as:

> Did the district court err in concluding that advice to lie to the court is not deficient performance especially in this situation wherein a simple alternative was available – to either have shown Mr. Steinemer the video/audio prior to the plea hearing or to request a delay in the entry of the plea long enough to show Mr. Steinemer the audio/video discovery?

(Appellant's Brief, p.5.)

The state rephrases the issue as:

Has Steinemer failed to establish that the district court erred in summarily dismissing his post-conviction petition?

ARGUMENT

Steinemer Has Failed To Establish That The District Court Erred In Summarily Dismissing His Post-Conviction Petition

A. Introduction

The district court granted the state's motion to summarily dismiss Steinemer's post-conviction petition because, pursuant to I.C. § 19-4906(c), none of his claims presented a genuine issue of material fact. (R., pp.117-123.) On appeal, Steinemer contends the trial court erred by summarily dismissing his claim that his trial counsel provided ineffective assistance under Strickland[2] because counsel allegedly advised Steinemer to "lie" on his guilty plea advisory form about whether he had reviewed the video/audio recordings of the victim's statement. (Appellant's Brief, pp.6-8.) Contrary to Steinemer's argument, the district court properly summarily dismissed his claim.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely

[2] See Strickland v. Washington, 466 U.S. 668 (1984).

review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. General Legal Standards Governing Post-Conviction Proceedings

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than "a short and plain statement of the claim" that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 802 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581,

583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297.

While a court must accept a petitioner's unrebutted allegations as true, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the district court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

D. Legal Standards Applicable To Ineffective Assistance Of Counsel Claims

In order to prove a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). With respect to the deficient performance prong, the United States Supreme Court has articulated the defendant's burden under Strickland as follows:

> To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness. A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. The challenger's burden is to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.

Harrington v. Richter, 562 U.S. 86, 104 (2011) (citations and quotations omitted). "This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." Arellano v. State, 158 Idaho 708, 710, 351 P.3d 636, 638 (Ct. App. 2015) (citing Howard v. State, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994)).

To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Richter, 562 U.S. at 104. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citations and quotations omitted). When the alleged deficiency involves counsel's advice in relation to a guilty plea, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58 (1985) (footnote and citations omitted). "Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under

the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000)).

E. Steinemer Has Failed To Show Any Error In The District Court's Summary Dismissal Of His Post-Conviction Claim That His Trial Counsel Provided Ineffective Assistance By Allegedly Advising Him To Lie On His Guilty Plea Advisory Form

Steinemer contends the district court erred in summarily dismissing his claim that his trial counsel was ineffective because he allegedly advised Steinemer to "lie" on his guilty plea advisory form by checking "yes" to indicate he had reviewed the video/audio recordings of the victim's statements. (See generally Appellant's Brief.) At the hearing on Steinemer's motion to withdraw his guilty pleas, his former trial counsel, Mr. DeFranco, testified to the contrary, as follows:

> Q. Did you have an opportunity to visit with the defendant prior to him pleading guilty?
>
> A. I did.
>
> Q. And did you talk with him about the guilty plea form?
>
> A. I did.
>
> Q. At this point, did the defendant have any questions, concerns, reservations?
>
> A. I know we discussed it, so I believe whatever questions or concerns that he had were satisfied before we went through the formality of pleading guilty.
>
> Q. On the affidavit in support of motion to disqualify counsel, allegation number four, it specifically states that on the guilty plea advisory form there is a question regarding the discovery in the case and my attorney told me to, quote, "check yes as having seen the video and listened to the audio."

A. Right.

Q. Is that something that you did with the defendant?

A. I read that. And.

MR. CHASTAIN: Mr. DeFranco read what, read the guilty plea form or something else?

THE WITNESS: The guilty plea form. And also I read the affidavit where he said that his -- me, that I told him that he needed to check this.

And to say I have an Independent recollection of exactly what I said, I don't. But I knew what he was saying. What he was saying was that I told him that he better check that – that he better check that. And if we discussed it in that context I would not have said that you better check that. I would have said that if you want to plead guilty and you want the Court to accept your plea, you have to check this. So I think I am explaining myself.

It was a matter of semantics, though, and I felt like when I read the affidavit or the suggestion that somehow I had forced him to check that and that is not true.

(R., p.63 (Tr., p.58, L.8 – p.59, L.25).)

During cross-examination, the following colloquy between Steinemer's counsel and Mr. DeFranco occurred:

Q. Were you satisfied at the time you prepared this affidavit for him that prior to entering the guilty plea he had not seen or heard the audio/video interview of the victim?

A. No, I wasn't, because I don't know that the public defender[3] didn't do that with him. In fact, I was surprised when he told me that he hadn't seen it.

[3] According to the district court, after Steinemer was indicted on April 20, 2010, Ada County Public Defender David Simonaitis was appointed to represent him. (R., p.117.) Over a year later, on April 29, 2011, Mr. Simonaitis withdrew as Steinemer's attorney and Mr. DeFranco replaced him as an Ada County public defender conflicts counsel. (R., p.117.)

(R., p.65 (Tr., p.66, Ls.2-9).)

The district court considered Mr. DeFranco's testimony together with Steinemer's supporting evidence and properly determined that, based upon the applicable legal standards and underlying criminal record, Steinemer failed to raise a genuine issue of material fact entitling him to an evidentiary hearing on his post-conviction claim. (See R., pp.117-123.) The court explained:

> As to his second assertion concerning ineffective assistance of counsel during the guilty plea process, Petitioner has not demonstrated deficient performance by Mr. DeFranco. Petitioner asserts that he initially checked "No" on the guilty plea advisory form as to whether he had been able to review all of the discovery in his case, but Mr. DeFranco advised him that the Court would not accept his guilty plea unless he answered "Yes" to that question. See Affidavit of Facts in Support of Post-Conviction Petition at 1-2. This issue was previously addressed in the Court's Memorandum Decision and Order on Petitioner's motion to withdraw guilty plea, in which the Court concluded that "Mr. DeFranco did not force Defendant to change his answer to the question in the guilty plea advisory form that he had the chance to review all discovery in the possession of his attorney before entering his plea. Rather, this was a decision Defendant made so the Court would accept his plea."[4] See State's Answer, Exhibit 1 at 4-5. Mr. DeFranco's testimony at the hearing on the motion to withdraw guilty plea was consistent with Petitioner's assertion that Mr. DeFranco indicated Petitioner would have to answer "Yes" to that question on the guilty plea advisory form if Petitioner wanted the Court to accept his guilty plea. Mr. DeFranco was clear that he did not force Petitioner to answer "Yes." See State's Answer, Exhibit 2 at 59. The record supports the conclusion that Petitioner made the decision to change his answer to "Yes," and Mr. DeFranco's advice concerning this issue did not fall below an objective standard of reasonableness. Accordingly, summary dismissal of this claim is appropriate.

(R., p.121.)

[4] Because the issues are closely related, some of the facts and analysis in the district court's decision denying Steinemer's motion to withdraw his guilty plea are relevant here. (See R., pp.39-44.)

By concluding that Mr. DeFranco's advice did not "fall below an objective standard of reasonableness," the court necessarily found that Steinemer failed to show deficient performance under Strickland. See Richter, 562 U.S. at 104. Indeed, Steinemer's trial counsel advised him that the court would not accept his guilty pleas unless he checked "yes" to the question of whether he had reviewed all the discovery – which was (presumably) literally true. Giving such factually correct information was not tantamount to telling Steinemer to lie to the court. See Jefferson v. Bartlett, 2006 WL 3408020 *8 (D. Oregon 2006) ("[T]here is a clear distinction between advising a client as to the likelihood of certain findings by the jury and advising a client to lie."). It was Steinemer's decision on how to proceed after receiving that information, and he chose to mark "yes" on the guilty plea advisory form in order to have the court accept his plea. Moreover, as Mr. DeFranco testified, he could not be certain (and was surprised to later learn) that during the time Steinemer was represented by Mr. Simonaitis, Steinemer had not reviewed the video/audio recordings of the victim's statements. (See R., p.65 (Tr., p.66, Ls.2-9).) Steinemer's attempt to characterize trial counsel's advice as a directive to "lie" is not supported by the record; therefore, he has failed to show any error in the district court's summary dismissal of his claim under the "deficient performance" requirement of Strickland.

Additionally, or in the alternative, this Court may affirm the district court's summary dismissal of Steinemer's post-conviction petition on any ground set forth by the state in its motion for summary dismissal, including that Steinemer failed to make a prima facie showing under the second requirement of Strickland

-- prejudice. While a post-conviction petitioner is entitled to notice prior to the summary dismissal of his post-conviction claims from either the court or from the state's motion to dismiss, I.C. § 19-4906; Kelly v. State, 149 Idaho 517, 522-523, 236 P.3d 1277, 1282-1283 (2010), an order of summary dismissal may be affirmed on appeal on the grounds asserted in the state's motion to dismiss if no material issue of fact on those grounds is contained in the record. See Ridgley v. State, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010); Baxter v. State, 149 Idaho 859, 864-865, 243 P.3d 675, 680-681 (Ct. App. 2010). In this case, the summary dismissal of Steinemer's claim should also be affirmed on the alternate ground that he failed to meet the "prejudice" requirement of Strickland.[5] (See R., pp.20-22, 28-38.)

During the change of plea hearing, Steinemer was placed under oath and then informed the court that his attorney satisfactorily answered his questions about the plea advisory form, he filled out the form in his own handwriting, and all the answers contained in the form were true and correct. (R., p.52 (Tr., p.18, L.23 – p.19, L.22).) According to Anderson v. State, 746 N.W. 2d 901 (Minn. App. 2008), false representations made by a defendant under oath have greater significance than even a trial attorney's advice to "lie."

[5] Steinemer's decision to plead guilty came before his trial counsel allegedly advised him to lie on the guilty plea form. Therefore, counsel's advice could not have led to Steinemer's initial decision to plead guilty. Instead, Steinemer appears to argue that he would have changed his mind about pleading guilty after reviewing the victim's recorded statements to law enforcement.

In Anderson, the Minnesota Court of Appeals rejected Anderson's claim that her attorney was ineffective for advising her to lie to the trial court by admitting guilt, stating:

> To the extent Anderson bases her appeal on the notion that it is ineffective assistance for her lawyer to advise her to lie to the court by admitting guilt to a crime her lawyer does not believe she committed, the contention fails for at least three independent reasons. First, the district court's instruction to Anderson and its administration of the oath to tell the truth at her plea hearing superseded any defective advice by her trial attorney that she lie about her guilt. Anderson's sworn duty to tell the truth, as directed by the oath, is too fundamental and obvious an obligation to be dismissed by contrary advice to violate it, even if suggested or encouraged by her attorney. "Our legal system depends on the truthfulness of the testimony of witnesses and false testimony strikes at the very heart of the administration of justice." The alleged advice to lie under oath should be rejected by even the least enlightened defendant in the face of her fundamental duty to tell the truth under oath; the alleged advice to lie therefore cannot be deemed to have prejudiced Anderson under *Strickland.*

Anderson, 746 N.W. 2d at 908 (citations omitted); see Ex parte Tomlinson, 295 S.W.3d 412, 421 (Tex. App. 2009) ("Tomlinson, knowing he would be lying, chose to plead guilty to the charges and to admit guilt . . .. Under these circumstances, we cannot say that his guilty plea was the result of the erroneous advice of counsel to such an extent that it rendered his plea involuntary or that, absent the advice of counsel, he would not have pleaded guilty in order to obtain a favorable plea bargain.").

Even assuming, *arguendo*, trial counsel's advice to Steinemer – that if he wanted the court to accept his guilty plea he would have to check "yes" to indicate he had reviewed discovery – was tantamount to a directive to "lie," Steinemer failed to show such advice resulted in prejudice by causing him to

plead guilty. Steinemer made his own decision while under oath to check "yes" and then tell the court that all his responses were true and correct – all in his quest to have the court accept his guilty plea. As in Anderson, Steinemer's decision to lie to the court precludes him from showing that his counsel's advice prejudiced him under Strickland. Cf. State v. Hanslovan, 147 Idaho 530, 536-537, 211 P.3d 775, 781-782 (Ct. App. 2008) (upholding denial of motion to withdraw a guilty plea based on claim that counsel advised defendant to not disclose a "secret deal" that induced defendant to plead guilty, where the record supported trial court's finding that defendant's "desire to plead guilty was so strong that he knowingly perjured himself in order to accomplish his goal").

Moreover, as the Idaho Court of Appeals concluded previously, "it is undisputed that Steinemer was aware of the victim's statements before he pleaded guilty[,]" noting: (1) Steinemer had the Grand Jury transcript and police reports available to him, which contained the victim's statements suggesting Steinemer's father controlled Steinemer, (2) Steinemer's trial counsel testified at the hearing on his motion to withdraw his pleas that, prior to Steinemer's guilty pleas, counsel discussed the defense of duress or coercion ten to twenty times with him, based on the Grand Jury transcript and police reports, and (3) during a recorded phone call from jail before he pleaded guilty, Steinemer said he would submit the victim's statements at trial so "the jury can hear her saying that . . . she knows I was in fear of my father, she knows I was not . . . or I was in control of my father and all that other good gossip stuff so that way the jury like understands I had nothing to do with it." Steinemer, Docket No. 39869, 2013

Unpublished Opinion No. 472 at 4-5. Based on the previous determination by the Idaho Court of Appeals, Steinemer failed to demonstrate a genuine issue of material fact about whether, given what he knew about the victim's statements, there was a reasonable probability that, absent trial counsel's alleged advice to lie about reviewing the victim's recorded statements, he would not have pleaded guilty. See Hill, 474 U.S. at 58.

The district court's summary dismissal of Steinemer's claim should be affirmed on the additional or alternative ground that he failed to present a genuine issue of material fact showing his trial counsel's advice resulted in prejudice under Strickland.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Steinemer's petition for post-conviction relief.

DATED this 18th day of May, 2016.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of May, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

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/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

JCM/dd